

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8

PHOENIX CEMENT

Employer

and

OPERATIVE PLASTERERS & CEMENT  
MASONS, INTERNATIONAL ASSOCIATION  
LOCAL 404

Petitioner

Case No. 8-RC-16697

and

INTERNATIONAL UNION  
BRICKLAYERS AND ALLIED  
CRAFTWORKERS LOCAL 16

Intervenor

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.<sup>1</sup>

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

*All full-time and regular part-time journeyworker and apprentice cement masons employed by the Employer, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.*

The record indicates there are approximately 34 employees in the unit found appropriate herein.

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<sup>1</sup> The Petitioner filed a post-hearing brief that has been duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claim to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

## **I. Issues**

The Petitioner, Local 404, seeks a unit of cement masons employed by the Employer without geographic limitation. The issue is also raised as to whether or not the cement mason foremen are supervisors within the meaning of Section 2(11) of the Act.

## **II. Decision Summary**

I find that the appropriate unit is one without geographic limitations. In reaching this conclusion, I have determined that none of the Employer's collective bargaining agreements constitute a bar to this proceeding.

I further find that the individuals who serve as cement mason foremen; Robert Bavic, Pete Groening, Paul Salvaggi and James Tindera, are not supervisors and therefore are eligible to vote in the election directed herein.

## **III. Background**

The Employer is a concrete subcontractor based in Berea, Ohio. It employs its own carpenters, operators, ironworkers, laborers and cement masons. The Employer performs most of its concrete work in Northeastern Ohio, only occasionally taking jobs as far west as Toledo. As its work is somewhat seasonal in nature, the total number of employees working in the field varies from 40 to 120.

Out of this number, the Employer has a core group of no less than six cement masons who travel to each of its jobs wherever located. This group is supplemented by additional hires during the Employer's peak season. The number of cement masons working at any given time exceeds 30. The record establishes that for the past several years, the Employer's cement masons are either members of the Petitioner or the Intervenor. The Employer usually hires cement masons from its own list of individuals who have worked for it in the past. It occasionally will contact the Petitioner or Intervenor for a referral.

Work on the Employer's larger jobsites is conducted under the direction of a job superintendent. Superintendents are selected from the ranks of the carpenters employed by the Employer. Four of the cement masons are occasionally assigned as foremen to carry out some oversight responsibility for the concrete finishing work conducted on the Employer's jobs.

The Employer has a current contract with the Petitioner, OP Local 404, that covers concrete work performed in Cuyahoga County, Ohio. It is also party to a contract with the Intervenor, BAC Local 16, covering work performed in Lake, Geauga and Ashtabula Counties of Ohio. Further, the Employer is party to a contract with another cement masons local union, Local 109 in Akron, Ohio. This agreement covers cement masons' work performed in certain other Ohio counties; Carroll, Holmes, Medina, Portage, Stark, Summit, Tuscarawas and Wayne.

## **IV. Unit Scope**

I find a unit without geographic boundaries, as requested by the Petitioner, to be appropriate. First, I note that the Petitioner need only seek an appropriate unit, not the most appropriate one. **Overnite Transportation Co., 322 NLRB 723 (1996)**. Second, the Board has

recently noted in **Premier Plastering, Inc.**, 342 NLRB No. 111 (2004), that the basic proposition in making unit determinations in the construction industry is that the proper unit description is one without geographic limitation where a core group of employees work at an employer's various worksites regardless of location. As noted above, this Employer does utilize a core group of cement masons on all its jobs.

The Board further noted in **Premier Plastering, supra**, that traditional community of interest factors should be considered in determining whether a construction industry bargaining unit should be limited geographically. Such an analysis in this matter provides no support for such limits. First, all the Employer's job sites, regardless of location, are conducted under the oversight of the same group of superintendents and/or foremen. Second, its cement masons work on most of all of the Employer's jobs, regardless of location. Third, while the Employer may apply different collective bargaining agreements to its work, depending on job location, there is no record evidence that the terms of these agreements vary from one another in any significant way. Therefore, it cannot be said that employees' working conditions vary significantly depending on the location of the job. Accordingly, a traditional community of interest analysis supports my finding against any geographic limitations to this bargaining unit.

Further, none of the collective bargaining agreements to which the Employer is a party serve to limit the scope of the unit found appropriate herein. The Board noted in **Premier, supra** and **G.L. Milliken Plastering**, 340 NLRB No. 138 (2003) that employees performing work already covered by Section 9(a) agreements must, normally, be excluded from any unit found appropriate in a representation proceeding. One such exception is a union seeking certification during the life of a Section 9(a) agreement to which it is a party. So, whether the Employer's contract with the Petitioner is a Section 8(f) or 9(a) agreement, the latter is free to seek certification anytime during the term of said agreement. **General Box, Co.**, 82 NLRB 678 (1949). Regarding the Employer's contract with the Intervenor, it is a three year agreement that expires by its terms on April 30, 2005. Accordingly, this petition is timely filed during the so-called "window period" of that agreement. **Leonard Wholesale Meats**, 136 NLRB 1000 (1962). Finally, I note that this petition was filed more than 3 years from the effective date, June 1, 2001, of the agreement the Employer has with OP Local 109. Accordingly, this contract also does not serve as a bar to this proceeding and does not require any geographic exclusion from this unit. **General Cable Corp.**, 139 NLRB 1123 (1962).<sup>2</sup>

Accordingly, for all the reasons noted herein, I find the petitioned-for unit to be appropriate.

## **V. Supervisory Status of Working Foremen**

As noted above, the Employer frequently assigns some oversight duties to Robert Bavic, Pete Groening, Paul Salvaggi and James Tindera over concrete finishing work. However, the record establishes that this oversight does not involve the exercise of independent discretion. John Mayer, the Employer's president, makes final decisions about scheduling and manning cement finishing jobs. There is no evidence that any recommendations these foremen may make on such matters are given any weight. Mayer further testified, without contradiction, that these

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<sup>2</sup> As it is not necessary in my resolution of the issues in this case, I make no finding as to whether any of the three collective bargaining agreements referred to herein are Section 8(f) or Section 9(a) agreements.

foremen have no role in discipline, as he conducts independent investigations of any incidents involving the potential for discipline.

There is no evidence that the foremen have any authority regarding hiring, firing, assignment of overtime, or evaluation of employees. By contract, the foreman receives a higher rate of pay than other journeymen. However, there is also no evidence that they receive any fringe benefits different from other cement masons.

Section 2(11) of the Act defines the term "supervisor" as "any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment."

The exercise of some supervisory authority in merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status. **Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985), aff'd. in relevant part 794 F.2 527 (9<sup>th</sup> Cir. 1986).**

Based on the above, I have concluded that the cement mason foremen are not supervisors within the meaning of the Act. It is undisputed that most of their work time is spent performing the duties of any other cement mason. Any involvement in the routine direction of work is not of the type to confer supervisory status. **North Shore Weeklies, Inc., 317 NLRB 1128 (1995).** As the Supreme Court noted in **NLRB v. Kentucky River Community Care, Inc., 121 S.Ct. 1861, 1863 (2001)**, there is a distinction to be drawn between employees who direct the manner of others' performance of discrete tasks and supervisors who direct other employees. The direction engaged by these foremen clearly involves the former.

As the Employer is engaged in the construction industry and the record reflects that the number of unit employees varies from time to time, the eligibility of voters will be determined by the formula set forth in **Daniel Construction Co., 133 NLRB 264 (1961)** and **Steiny & Co., 308 NLRB 1323 (1992).**

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.<sup>3</sup> Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees

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<sup>3</sup> In its brief the Petitioner requested, for the first time, that this election be conducted by mail ballot. I will defer a decision on that request until a point in time when the election arrangements are being discussed with all the parties, in order to allow the Employer and the Intervenor to express a position on this issue.

engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by Operative Plasterers and Cement Masons Local 404, International Union Bricklayers and Allied Craftworkers Local 16 or neither.

### **LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by April 13, 2005.

**DATED** at Cleveland, Ohio this 30<sup>th</sup> day of March 2005.

/s/ Frederick J. Calatrello

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Frederick J. Calatrello  
Regional Director  
National Labor Relations Board  
Region 8